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In re Application of :
Jonathan Wade Ain, et al. :
Application No. 09/366,768 :
Filed: August 4, 1999 :
For: **FIBRE CHANNEL ADDRESS BLOCKING** :
:

:DECISION ON PETITION

This is a decision on the petition filed September 8, 2003, based on M.P.E.P. 711.03(c)(II), and pursuant to 37 C.F.R. § 1.181(a), to withdraw the holding of abandonment. No fee is required.

This application became abandoned for failure to timely file a proper reply to the non-final Office action mailed September 12, 2002. A Notice of Abandonment was mailed on July 29, 2003.

Petitioner alleges that the non-final Office action mailed September 12, 2002 was not received.

Based on M.P.E.P. § 711.03(c) [*See also Notice entitled Withdrawing the Holding of Abandonment When Office Actions Are Not received, 1156 O.G. 53 (November 16, 1993)*], in absence of any irregularity in the mailing of an Office Action, there is a strong presumption that the Office action was properly mailed to practitioner at the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. The showing required to establish the failure to receive an Office communication must include:

- (a) a statement from the practitioner stating that the Office communication was not received by the practitioner;
- (b) a statement attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received; and,
- (c) a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office communication may have been lost after receipt rather than a conclusion that the Office communication was lost in the mail.

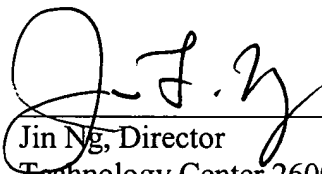
A review of the records indicate that the Office action was properly mailed to the practitioner of record at the correspondence address at the time of mailing. Thus, there was no irregularity in mailing the Office action on the part of the U.S. Patent and Trademark Office.

The allegation of non-receipt is supported by a statement from Ms. Jean Barkley, an in-house IBM patent attorney (9000 South Rita Road correspondence address), attesting that the Office Action was not received at the IBM Corporation (9000 South Rita Road correspondence address), and that a search of the contents of the files and docket records reveal no evidence of receipt. Although the statement from Ms. Barkley does not specifically mention the South Rita Road address, a review of the US PTO PALM Intranet Attorney Registration and Customer Information screen finds that practitioner Barkley is associated with the IBM, South Rita Road correspondence address. It is also noted that the statement from Ms. Barkley does not specifically state that she searched the "file jacket"; however, her statement, "We have checked our files and our records with respect to Serial No. 09/366,768" is being interpreted to include a search of the file jacket. Copies of the docket records have also been included to corroborate petitioner's claim.

The showing offered is therefore deemed to comply with the requirements of a successful petition to withdraw the holding of abandonment due to non-receipt of an Office action. Therefore, the Notice of Abandonment is hereby vacated and the holding of abandonment withdrawn.

Accordingly, the petition is **GRANTED**.

Due to the time lapse between the original mailing and the date of this decision, the application file is being forwarded to the examiner for updating the search and other action as appropriate. From there, the file will be forwarded to the Technology Center's technical support staff for mailing a new Office Action. The period for response will be set to run from the date of the new mailing.


Jin Ng, Director
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Communications